(2)

No. 91-1699

Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

IN THE
# Supreme Court of the United States
October Term, 1991

VIVIANA McCALDEN, AS ADMINISTRATOR OF THE ESTATE OF DAVID McCALDEN,
*Petitioner,*

*v.*

THE SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES, RABBI MARVIN HIER, THE AMERICAN JEWISH COMMITTEE AND THE CITY OF LOS ANGELES,
*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION

LAURENCE H. TRIBE
*Counsel of Record*
BRIAN STUART KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

JEFFREY N. MAUSNER
LAURENCE M. BERMAN
BERMAN, BLANCHARD, MAUSNER & KINDEM
MARTIN MENDELSOHN
HALPRIN, MENDELSOHN & GOODMAN
*Counsel for Rabbi Marvin Hier and The Simon Wiesenthal Center*

HOWARD I. FRIEDMAN
DOUGLAS E. MIRELL
MICHAEL F. SITZER
LOEB AND LOEB
*Counsel for The American Jewish Committee*

JAMES K. HAHN
City Attorney
JOHN F. HAGGERTY
Assistant City Attorney
MARCIA HABER KAMINE
Deputy City Attorney
*Counsel for Los Angeles*

May 11, 1992

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . i

STATEMENT OF THE CASE . . . . . 1

REASONS FOR DENYING THE WRIT . . . . . 3

CONCLUSION . . . . . 8

## TABLE OF AUTHORITIES

***Cases:***

*Garcia v. Bd. of Education*, 498 F.Supp. 880 (D.N.M. 1980) 5

*Gleason v. McBride*, 869 F.2d 688 (2d Cir. 1989) . . . . . 6

*Griffin v. Breckenridge*, 403 U.S. 88 (1971) . . . . . 3,4,6

*Martinez v. Winner*, 771 F.2d 424 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986) . . . . . 7

*Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) . . . . . 7

*Nat'l Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, No. 90-985 . . . . 4

*Rodgers v. Tolson*, 582 F.2d 315 (4th Cir. 1978) . . . . . 7

*United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983) . . . . . 3,4,6

## TABLE OF AUTHORITIES (cont.)

*Constitutional Provisions, Statutes and Rules:*

U.S. Constitution, First Amendment . . . . . *passim*

42 U.S.C. § 1983 . . . . . 2

42 U.S.C. § 1985(3) . . . . . *passim*

42 U.S.C. § 1986 . . . . . 3

Unruh Civil Rights Act, Cal.Civ.Code § 51.7 . . . . . 2

Fed.R.Civ.P. 12(b)(6) . . . . . 1

## STATEMENT OF THE CASE

Petitioner McCalden seeks plenary review so that he can urge this Court to expand the scope of 42 U.S.C. §1985(3) so as to provide a cause of action to any individual, such as himself, who claims to be the victim of political or ideological opposition directed against a supposed "class" defined as people who share his ideas. Thus, McCalden would ask the Court effectively to eliminate from §1985(3) the historical requirement that the plaintiff be a victim of class-based animus. McCalden's request is unworthy of this Court's time and attention.

This is the second petition for writ of certiorari presented to this Court in connection with the decision below. This petition, filed by plaintiff McCalden, seeks review of the Ninth Circuit's judgment dismissing McCalden's claims under 42 U.S.C. §§ 1985(3) and 1986. The petition in No. 91-1643, filed by the parties who are respondents here, seeks review of the First Amendment issues raised by the Ninth Circuit's judgment reinstating McCalden's other claims and remanding for trial on those claims.

Petitioner McCalden is a self-proclaimed "Holocaust revisionist" who proselytizes the view that the historical record of Nazis murdering millions of Jews and other civilians is a hoax. Complaint ¶ 54 (A72).[1] When the California Library Association ("CLA") canceled an exhibit that McCalden had planned to present at the CLA's 1984 annual convention, McCalden sued the CLA for breach of contract in a U.S. District Court. He also brought suit against the respondents — the Simon Wiesenthal Center for Holocaust Studies ("Center"), the Center's Dean, Rabbi Marvin Hier, the American Jewish Committee ("AJC"), and the City of Los Angeles — alleging that they conspired to induce the CLA to cancel McCalden's exhibit contract "by threatening and organizing a demonstration which [they] knew and intended would create a

---

[1] Since the case was appealed from the District Court's dismissal under Fed.R.Civ.P. 12(b)(6), the facts set forth here are derived from the allegations of the complaint. Citations to the appendices printed with the petition in No. 91-1643, which McCalden has xeroxed and attached to his own petition as well, will be styled "A__."

reasonable probability of property damage and of violence against plaintiff and members of defendant CLA." Complaint ¶ 32 (A67).

McCalden sought general and punitive damages against respondents Rabbi Hier, the Wiesenthal Center and the AJC for violation of California's Unruh Civil Rights Act, Cal.Civ.Code § 51.7. (A74). He also sued the City of Los Angeles, as well as the Center, Rabbi Hier and the AJC, for tortious interference with contractual relations and deprivation of unspecified federal rights in violation of 42 U.S.C. § 1983. (A64, A70).[2] Although the District Court dismissed McCalden's complaint under Fed.R.Civ.P. 12(b)(6), a divided panel of the Court of Appeals for the Ninth Circuit reversed in part and reinstated the Unruh Act, tortious interference and §1983 claims and remanded for a trial. (A15). No fewer than five members of the Ninth Circuit vigorously took issue with this part of the panel majority's decision and filed dissents from the denial of rehearing en banc, arguing that forcing respondents to proceed to trial on these claims violated the First Amendment. (A39-58). Those First Amendment issues are the subject of the petition for writ of certiorari in No. 91-1643, filed by the AJC, the Wiesenthal Center, Rabbi Hier and the City of Los Angeles on April 10, 1992.

McCalden also sought damages from respondents under 42 U.S.C. §1985(3), alleging that a "conspiracy" involving respondents was "directed against [him] not as an individual but solely because of his membership in a class known as Holocaust revisionists." (A72). Respondents Center, Hier and AJC allegedly petitioned the City Council of Los Angeles and other state and local public officials to put pressure on the CLA to cancel McCalden's exhibit, and allegedly persuaded the City Council to pass a resolution condemning the CLA for providing a forum for McCalden's anti-Semitic views. (A65-69). The District Court dismissed this claim (A27):

---

[2] The Ninth Circuit also reinstated (and remanded for trial) McCalden's breach of contract claim against the CLA (A5-6), which is not at issue here or in any other petition for writ of certiorari.

> [P]laintiff alleges animus based upon unpopular and repugnant views concerning the mass extermination of the Jewish people by the Nazis during World War II. The court finds that plaintiff's allegations . . . fail to adequately allege that he is a member of a suspect or quasi-suspect class which is subject to protection under §1985(3).

The Court of Appeals for the Ninth Circuit affirmed, rejecting as wholly inadequate McCalden's allegations of "animus against the class of individuals holding particular unpopular historical views." (A12). The court below therefore held, relying on this Court's decisions in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), and *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983), that McCalden's "self-identified 'class'" does not "fall[ ] within the ambit of classes §1985(3) has been interpreted to protect." (A11-12).[3] McCalden moved for rehearing and rehearing en banc on the §1985 issue, but although the Ninth Circuit was sharply divided on the First Amendment issues raised by the defendants (now before this Court in the petition in No. 91-1643), not a single circuit judge disagreed with the panel's dismissal of McCalden's claims under §1985(3).

## REASONS FOR DENYING THE WRIT

1. McCalden urges the Court to grant his petition to decide whether all "politically motivated conspiracies" are actionable under §1985(3) because the lower courts are supposedly in turmoil over this issue and because, he contends, said turmoil is this Court's own fault: "this Court has not resolved the issue . . . and, if anything, has added to the uncertainty on this point." Petition at 10. Strangely enough, in canvassing the supposed diversity of lower court opinion on this subject the petition does not so much as mention the

---

[3] McCalden also sought relief pursuant to 42 U.S.C. §1986. The District Court's dismissal of this claim was likewise affirmed by the Ninth Circuit because, as McCalden himself concedes, Petition at 17, and as the court below held (A12), a claim can be stated under §1986 only if the complaint states a valid claim under §1985(3).

decision in *Nat'l Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), which is currently on review in this Court *sub nom. Bray v. Alexandria Women's Health Clinic*, No. 90-985 (argued October 16, 1991).

Surely any need for clarification of genuine doubts about the scope of §1985(3) will be met by the forthcoming decision in *Bray*. Despite McCalden's bold entreaty, however, there is in fact no turmoil surrounding the radical reading of §1985(3) that he proposes and, even if there were, this case would be a very poor vehicle for deciding such an issue.

2. Regardless of how *Bray* is decided, the §1985 holding in this case is unremarkable and unworthy of plenary review. The question here is not *which* classes, groups or associations are protected by §1985(3), but whether one even has to be a member of a group victimized by *class-based animus* in order to have a cause of action under that statute. Whatever else may be said of the scope of §1985(3), this Court has unanimously held that a prerequisite to bringing suit under that provision is the presence of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. at 102. *See also Carpenters*, 463 U.S. at 835 ("class-based, invidious discrimination . . . was the central concern of Congress in enacting §1985(3)"); *id.* at 851 (Blackmun, J., dissenting)("Congress intended to provide a federal remedy for all *classes* . . . whenever a conspiracy involved invidious animus toward a class of persons")(emphasis in original).

Plaintiff McCalden is not a member of any "class" protected by §1985(3), nor a victim of any class-based animus. According to his own petition, McCalden's planned exhibit at the CLA conference was opposed by the respondents because they allegedly deem his "views" and "denial of the Holocaust" to be "a matter of grave concern to a much broader community than just the Jewish community" — "a battle against the forces of hatred or anti-Semitism." Petition at 7. Indeed, McCalden's complaint alleges that respondents' "only rationale" for acting against him was that his "views are generally thought to be repugnant, hateful and untruthful." Complaint, ¶ 43 (A69). In short, McCalden met opposition because of

his *own views*, not because of his race, religion, gender or membership in any political group.

The limitations written into §1985 cannot be sidestepped by McCalden's claim of membership in what he describes as an alleged "class known as Holocaust revisionists." Petition at 7. This is nothing more than creative labeling: McCalden meets widespread opposition when he plans an exhibit to proselytize his anti-Semitic, pro-Nazi views, so he claims to be a victim of a conspiracy aimed at "a class of Holocaust revisionists"; a school superintendent whose contract was canceled after he spoke out against the school board claimed he was the target of a conspiracy against the "class of school administrators concerned with proper administration of education." *Garcia v. Bd. of Education*, 498 F.Supp. 880, 881 (D.N.M. 1980) (rejecting §1985(3) claim). McCalden's §1985(3) claim, like that of the school official in *Garcia*, is a transparent attempt to "create[ ] a class around himself, tailored to the particular discrimination he claims to have suffered." *Id.*

If "classes" could be conjured as easily as McCalden thinks, so that every individual could be classified into myriad sets or categories on the basis of various traits, beliefs and characteristics, then the scope of §1985(3) would know no limits. But judicial application of that provision is an exercise not in clever set theory or linguistic taxonomy, but in statutory interpretation. In *Carpenters*, this Court deemed "difficult" the question whether

> §1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means. . . . If [plaintiff's] submission were accepted, the proscription of §1985(3) would arguably reach the claim that a political party has interfered with the freedom of speech of another political party by encouraging the heckling of its rival's speakers and the disruption of the rival's meetings.

463 U.S. at 836.

McCalden's reading of §1985 raises an even more troubling question. For "[e]ven if the section must be construed to reach

conspiracies aimed at any *class or organization* on account of its political views or activities," *id.* at 837 (emphasis added), there is no support in the legislative history or in logic for extending §1985(3) to reach concerted opposition to a particular planned public exhibit based on the "historical" (A12) and "scientific" views, Petition at 7, that the speakers espoused and planned to present. Under McCalden's reading, every speaker who claimed he'd been shouted down by his opponents, and every individual who claimed his rights had been infringed by concerted action, would become a class unto himself, and opposition to him would become class-based animus.

Petitioner's construction would make §1985(3) as all-encompassing as the version of the law originally introduced in the House of Representatives in 1871, which "provoked strong opposition in that chamber and precipitated the proposal and adoption of a narrowing amendment," *Carpenters*, 463 U.S. at 834, which required "class-based, invidious discrimination," *id.* at 835. *See also Griffin*, 403 U.S. at 101-02. Section 1985(3) would thus be transformed into precisely what those who wrote and adopted it expressly refused to enact: "a federal remedy for 'all tortious, conspiratorial interferences with the rights of others.'" *Carpenters*, 463 U.S. at 834 (quoting *Griffin*, 403 U.S. at 101.).

**3.** There is no authority for McCalden's reading of the class animus requirement as infinitely elastic. The cases on which petitioner relies involved pre-existing groups, well defined either by an immutable characteristic such as race, ethnicity or gender, or by membership in a political organization such as the Republican Party. *See* Petition at 11-13. Indeed, some of McCalden's authorities actually undermine his argument. For example, *Gleason v. McBride*, 869 F.2d 688, 695 (2d Cir. 1989), held that the rule that political *parties* are protected by §1985(3) was of no help to the plaintiff "because Gleason does not claim discrimination based on his political party affiliation":

> He alleged only that he was discriminated against because he was a political opponent of the defendants and was extremely vocal in his opposition to their management of the Village.

> As the Fourth Circuit has held, "those who are in political and philosophical opposition to [the defendants], and who are, in addition, outspoken in their criticism of the [defendants'] political and governmental attitudes and activities" do not constitute a cognizable class under §1985.

*Id.* at 685 (quoting *Rodgers v. Tolson*, 582 F.2d 315, 317 (4th Cir. 1978)).

Similarly, *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), held that before suit may be brought under §1985(3) for an alleged conspiracy based on political animus, "there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act." *Id.* at 839-40 (finding class-based animus against members of American Indian Movement).

McCalden also contends that *Martinez v. Winner*, 771 F.2d 424 (10th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986), effectively recognized the sufficiency of "essentially political" animus, because the court's finding of "racial animus" could not have been correct "since 'Mexicanos' are not a race but an ethnic group." Petition at 13. McCalden's restrictive notion of "race" partakes more of 19th-century anthropology (or eugenics) than of 20th-century law — ethnic minorities such as Hispanics have long been deemed protected by civil rights laws and the Equal Protection Clause. In any event, *Martinez* provides no support for petitioner's proposed expansion of §1985(3) to include "classes" defined by the circumstances of a particular ideological dispute:

> Martinez is a member of a racial and national minority and clearly alleges that he has been conspired against because of his race, political and social beliefs, and activities on behalf of his own and other minorities. . . . [H]e is not alleging a purely politically motivated conspiracy . . . .

771 F.2d at 440.

**4.** McCalden's only rationale for expanding §1985 so radically is that it would supposedly be unconstitutionally discriminatory to have

a law that protected classes defined by race but not "classes" defined by what he calls "historical" or "scientific" views. Petition at 13-14 & n.11. If this principle were adopted, it would doom a host of civil rights laws that outlaw discrimination by private parties based on race, creed, color, gender or national origin but not discrimination based on ideas or points of view.

**5.** Finally, the activities for which McCalden seeks damages under §1985(3) are all *prima facie* protected by the First Amendment: the Center, Rabbi Hier and the AJC allegedly petitioned the Los Angeles City Council and communicated to the CLA their plans for a public counter-demonstration if McCalden's exhibit were not canceled, and the City Council adopted a resolution calling for a boycott of the CLA. As argued in the petition for writ of certiorari in No. 91-1643, and as argued by five judges of the Ninth Circuit below, dissenting from the denial of rehearing en banc, the decision of the two-member panel majority to allow McCalden to proceed with his civil rights suit against defendants' protected expression is a perversion of the civil rights laws and a threat to the First Amendment. Those issues, which are addressed only in No. 91-1643 and not in McCalden's petition here, are worthy of this Court's plenary attention. But McCalden's plea for a radical expansion of §1985(3) is not.

## CONCLUSION

For the reasons set forth above, this petition should be denied.

Respectfully submitted,

LAURENCE H. TRIBE
*Counsel of Record*
BRIAN STUART KOUKOUTCHOS
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767
*Counsel for Respondents*

JEFFREY N. MAUSNER
LAURENCE M. BERMAN
BERMAN, BLANCHARD,
MAUSNER & KINDEM
4727 Wilshire Blvd.
Suite 500
Los Angeles, CA 90010
*Counsel for Rabbi Marvin Hier and the Simon Wiesenthal Center*

MARTIN MENDELSOHN
HALPRIN, MENDELSOHN
& GOODMAN
1301 K Street, N.W.
Suite 1020 East
Washington, D.C. 20005
*Counsel for Rabbi Marvin Hier and the Simon Wiesenthal Center*

HOWARD I. FRIEDMAN
DOUGLAS E. MIRELL
MICHAEL F. SITZER
LOEB AND LOEB
1000 Wilshire Blvd.
Suite 1800
Los Angeles, CA 90017
*Counsel for The American Jewish Committee*

JAMES K. HAHN
City Attorney
JOHN F. HAGGERTY
Assistant City Attorney
MARCIA HABER KAMINE
Deputy City Attorney
200 North Main Street
Suite 1800
Los Angeles, CA 90012
*Counsel for the City of Los Angeles*

May 11, 1992